

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. ALBERT NANCE

Appeal from the Criminal Court for Davidson County
No. PV 2002-B-844C Cheryl A. Blackburn, Judge

No. M2006-01696-CCA-R3-CD - Filed March 14, 2007

This matter is before the Court upon the State's motion to affirm the judgment of the trial court by memorandum opinion pursuant to Rule 20, Rules of the Court of Criminal Appeals. The appellant has appealed the trial court's order revoking his probation and ordering him to serve his sentence in incarceration. Upon a review of the record in this case, we are persuaded that the trial court was correct in revoking the appellant's probation and that this case meets the criteria for affirmance pursuant to Rule 20, Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted and the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Nathan S. Moore, Nashville, Tennessee, for the appellant, Albert Nance.

Robert E. Cooper, Jr., Attorney General & Reporter; Brent C. Cherry, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

On June 20, 2002, the appellant entered guilty pleas to burglary and theft. As a result, he was sentenced to three years for each offense. The trial court ordered the sentences to be served concurrently and suspended the sentences, placing the appellant on probation.

On August 30, 2002, the State issued a warrant for violation of probation alleging that the appellant had failed to report to his probation officer and that he had failed to pay his probation fees. The appellant conceded his violation and, as a result, the trial court revoked the appellant's probation

and ordered him to serve the three-year sentence. On that same date, the trial court recommended that the appellant be admitted into a drug treatment program.¹

On June 2, 2003, after successful completion of drug treatment, the appellant petitioned the court to suspend the remainder of his three-year sentence. After a hearing, the trial court granted the requested suspension, placing the appellant on probation for a two-year period effective June 20, 2003.

On October 17, 2003, a probation violation warrant was filed against the appellant, alleging that he: (1) failed to obtain and maintain full-time employment since being reinstated to probation; (2) failed to report to his probation officer; (3) failed to pay probation fees; and (4) failed to pay any restitution or court costs and failed to attend public service orientation and perform public service hours. The trial court held a hearing on February 11, 2005 and reinstated the appellant to probation.²

On March 3, 2006, another probation violation warrant was issued against the appellant, alleging that he tested positive for cocaine and marijuana on February 13, 2006. At the hearing on the warrant, the appellant conceded the violation. The trial court found that the appellant violated probation and ordered the original three-year sentence placed into effect. On appeal, the appellant argues that the trial court improperly placed his sentence into effect.

This Court's standard of review for a probation revocation is an abuse of discretion standard. State v. Stubblefield, 953 S.W.2d 223, 226 (Tenn. Crim. App. 1997). If the record presents substantial evidence to support revocation, the trial court's action will be upheld on appeal. Id.

A trial court has the authority to revoke a defendant's probation if the court finds by a preponderance of the evidence that the defendant has violated the conditions of his probation. Tenn. Code Ann. §§ 40-35-310, -311(d). At the revocation hearing, the appellant conceded the violation of probation. Thus, it is clear that the evidence that the appellant violated the terms of his probation is overwhelming. Consequently, the trial court did not abuse its discretion in its decision to revoke probation.

There is also substantial evidence to support the decision not to institute alternative sentencing. "Sentences involving confinement should be based on the following considerations: (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit

¹The trial court agreed that the appellant could petition the court for a reduction in sentence following successful completion of a drug treatment program.

²The record is not clear as to why there was a gap of nearly sixteen months between the issuance of the probation violation warrant and the hearing on the violation. It is also not clear how long the appellant was incarcerated while awaiting this hearing. However, it appears from the transcript of the hearing that the appellant may have served forty-two days on this warrant.

similar offenses; or (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.” Tenn. Code Ann. § 40-35-103. The appellant argues that his continued violations show that he has a drug abuse problem and that he needs help overcoming that problem. The appellant also states that he is a veteran and eligible for receipt of veteran’s services. These assertions do not belittle the fact that the appellant has repeatedly violated probation. The less restrictive measures of probation have twice previously been tried and failed. Therefore, the trial court’s decision to incarcerate is fully supported.

Rule 20, Rules of the Court of Criminal Appeals provides inter alia:

The Court, with the concurrence of all judges participating in the case, when an opinion would have no precedential value, may affirm the judgment or action of the trial court by memorandum opinion rather than by formal opinion, when:

The judgment is rendered or the action taken in a proceeding before the trial judge without a jury, and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the finding of the trial judge

For the above stated reasons, the decision of the trial court is affirmed in accordance with Court of Criminal Appeals Rule 20.

JERRY L. SMITH, JUDGE